FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 14 1960
JAMES R. BROWNING, Clerk

No. 899

In the Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Lawn v. *United States*, 355 U.S. 339	7
Pinkerton v. *United States*, 328 U.S. 640	7

Statutes:

21 U.S.C. 174	2, 3
26 U.S.C. 4705	2, 3, 10
26 U.S.C. 7237	3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 599

GEORGE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. 106-110) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1959. A petition for rehearing was denied on November 18, 1959 (Pet. App. 6a). The petition for a writ of certiorari was filed on Decem-

[1] The record is in an appendix form and will be referred to as "App."

ber 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction for violation of the narcotic laws.

2. Whether the comments of the trial judge during the trial were proper.

STATUTES INVOLVED

21 U.S.C. 174, 70 Stat. 570, provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than 5 or more than 20 years
> * * *
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. 4705 provides:

> (a) It shall be unlawful for any person to sell, barter, exchange, or give away narcotic

drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 7237 provides in pertinent part:

* * * *

(b) Whoever commits an offense, or conspires to commit an offense, described in section 4705 (a) or section 4742 (a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 * * *.

STATEMENT

A six count indictment returned in the district court for the Northern District of Illinois charged the petitioner with the unlawful sale, transportation and concealment of narcotics, in violation of 26 U.S.C. 4705(a) and 21 U.S.C. 174, *supra*. Before trial, the court granted the government's motion to dismiss count five, and count six was renumbered count five (App. 39-40, 94). Following a trial by jury, petitioner was found guilty as charged, and sentenced to serve a term of imprisonment of seven years (App. 96-98). On appeal, the conviction was affirmed.

1. The pertinent facts may be summarized as follows:

With the assistance of a special employee of the Bureau of Narcotics, Agent Mattingly met the petitioner on September 4, 1958, in Chicago. On in-

quiry by Mattingly, petitioner said that the price was $140 for a "piece" (an ounce), but that, perhaps later, he could come down in his price (App. 8). Later that evening, Mattingly paid the petitioner $140. Petitioner then pointed out a cigarette package under the bumper of a parked station wagon, and said, "There it is" (App. 9, 30; see App. 28). The package contained heroin (App. 71).

Following a telephone call to the petitioner, Mattingly and the petitioner met again in the evening of September 15.[2] When petitioner asked for the money, Mattingly gave him $400 (App. 13-14, 31, 35). At this point, an unidentified man approached and passed to Mattingly an envelope containing a substance which proved to be heroin (App. 14, 72). Petitioner then told Mattingly to take a taxi and leave the area.

On October 16, Mattingly telephoned the petitioner and asked for "two pieces." Petitioner replied that the cost would be $300 because there was "a panic on the streets" (App. 19). Mattingly agreed to the higher price and met the petitioner around 11:30 that evening. Petitioner looked nervous and told Mattingly that there was "a lot of heat" in the area and that he, the petitioner, thought that the "cops" were "around here" (App. 20; see App. 35). A short time later, petitioner asked for the money and told Mattingly that a third party would show him "where the stuff is hidden" (App. 20, 35). At this

[2] When Mattingly told the petitioner during this telephone conversation that he, Mattingly, had "four bills", petitioner replied, "I suppose that you want three pieces" (App. 13).

point, Mattingly gave a prearranged signal, and other agents, who were nearby, assisted him in arresting the petitioner.[3] Shortly thereafter, when the agents asked the petitioner to disclose where the narcotics were hidden, petitioner directed the agents to an alley, and pointing said, "There's where I put it" (App. 20-22; see App. 55-57, 62). When Mattingly picked up a package and asked the petitioner whether that was the package in question, petitioner replied, "Yes, that's it" (App. 22). The package contained heroin (App. 73).

Mattingly testified that, following the September 4 and 15 purchases and the October 16 "seizure", he returned to his office and locked the heroin in his desk for the night, and that on the following mornings the heroin was weighed, and together with the original wrappings or containers was placed in an envelope which was locked, sealed and initialed, and personally delivered by him, with an accompanying agent, to a government chemist in Chicago (App. 9-10, 11, 12, 14-15, 17, 23-27; see App. 47-48, 50, 52, 58). The chemist testified that he received two of the deliveries and that another chemist received the third delivery, and that, following his analysis of the heroin, he placed the heroin (and the other materials received from Mattingly with the respective deliveries) in envelopes which he locked, sealed,

---

[3] Petitioner told the agents that he "make[s] the neighborhood" before he makes his "meet", and that he suspected that Mattingly was an agent when he saw the other agents in the neighborhood (App. 56-57, 63). Petitioner refused to disclose his narcotics-supplier and stated in effect that "if you play you have got to pay" (App. 22).

initialed and stored in a vault (App. 69-70, 71-73, 75-76, 77-80). The chemist also testified that he retained possession of these envelopes until Mattingly called for them at the time of the trial, but that his (the chemist's) possession was not "exclusive" because three other chemists, a secretary, and a helper had access to the vault (App. 72, 76).

2. During the cross-examination of Mattingly, defense counsel inquired into Mattingly's testimony before the grand jury as it pertained to the original count five of the indictment, which had been dismissed on the government's motion at the opening of the trial. When the government objected to this line of questioning, the court indicated its agreement with the government's objection but nevertheless permitted the questioning to continue, stating that it was "not harmful" (App. 39-40). In this connection, Mattingly testified that he was in error before the grand jury if he used the word "sale" in describing his October 15 (*i.e.*, October 16) meeting with the petitioner (App. 40) (The original count five of the indictment charged the petitioner with a "sale" of narcotics on October 15 (16)).

When defense counsel, in his closing argument, told the jury that Mattingly had testified that he lied before the grand jury, the court interjected as follows (App. 92):

> Counsel, the agent did not say that he lied before the Grand Jury. Do not misstate his testimony. He did not say that he lied before the Grand Jury. You may make reasonable inferences, but don't misquote the record.

ARGUMENT

1. Petitioner contends (Pet. 23-25, 27-30) that the evidence is insufficient to support his conviction. To substantiate this, he argues that the government did not adequately corroborate the testimony of Mattingly, who petitioner claims was "impeached" by his own testimony with respect to his statement before the grand jury. Not only is this contention frivolous, but it has no application at all to count five of the indictment, which charged the petitioner with the transportation and concealment on October 15 of narcotics known by him to have been illegally imported. Petitioner admitted that he possessed and hid the heroin in an alley prior to meeting Mattingly on October 16, and he pointed out the location of the heroin (App. 21-22, 55-57, 62, 73). This evidence, standing alone, was sufficient to convict him on count five. Since petitioner received a general seven-year sentence which was less than the maximum permissible on any one of the five counts of which he was convicted, his conviction is properly sustainable on this count alone. *Lawn* v. *United States*, 355 U.S. 339, 359; *Pinkerton* v. *United States*, 328 U.S. 640, fn. 1 at 641-642.

Moreover, the mere fact that Mattingly admitted that he was in error in testifying before the grand jury that petitioner made a "sale" of narcotics to him on October 16 (App. 40-41) does not *ipso facto* render his testimony untrustworthy without corroboration. It is the jury's province to determine the credibility of the witnesses and the weight to be given to their testimony. The other agents fully

corroborated Mattingly with respect to the times, places and dates when Mattingly met the petitioner, to petitioner's admissions and conduct at the time of his arrest, and as to the time and manner in which Mattingly field-tested, secured and handled the heroin obtained from the petitioner (App. 46-49, 50, 51-52, 53-58, 59-63, 66, 67). The evidence amply establishes petitioner's guilt.

Petitioner's claim (Pet. 28-30) that the "chain of possession" of the heroin in the hands of the government was not sufficiently established is likewise erroneous. Merely because the record was unclear as to whether the heroin from the September 4 purchase was locked in a desk or a steel cabinet, or because more than one person had access to the vault in the laboratory where the heroin was stored in a sealed and locked envelope pending trial, or because a machine "slipped" and stamped a wrong number on one of the exhibits (which error was immediately rectified), does not destroy the government's "chain of possession" of the heroin. The jury had ample proof of the great care in securing and safeguarding the heroin, and there was nothing to indicate that anyone tampered with the sealed and locked envelopes. The chemist testified that the "seals cannot be removed without breaking, tearing it or cutting it" (App. 73), and the envelopes containing the heroin were opened in court (App. 10, 16, 26).

2. The comments of the trial judge—left unchallenged at the trial—did not have the effect of taking the issue of Mattingly's credibility from the jury, as petitioner contends (Pet. 25-26). The court allowed

defense counsel to cross-examine Mattingly as to his grand jury testimony on the count which had been dismissed, over the government's objection that this was irrelevant to the issues in the case. The court's comment that this line of questioning was not "harmful" was merely a recognition that the government's position had validity but that there was no harm in ascertaining what had occurred before the grand jury; it did not indicate that the matters adduced on cross-examination of Mattingly were to be disregarded or given little weight. And defense counsel's statement in summation that "Bill Mattingly told you himself that he lied before the Grand Jury" (App. 92) was not supported by Mattingly's testimony that he had been in error before the grand jury in describing the events of October 16 as a "sale" of narcotics. The judge therefore properly admonished counsel not to misstate what Mattingly had said, although pointing out that the defense could draw what reasonable inferences it wished from Mattingly's actual testimony.[4]

---

[4] Petitioner also makes a strained argument (Pet. 27-28), based on the judge's casual remark that "It wouldn't make any difference. It still would be heroin" (App. 75), that the judge took from the jury the issue of whether the narcotics had been imported or had been domestically made. The record (App. 74-75) reveals that, on direct examination by the prosecution, the government chemist, in answer to a question whether heroin was a derivative of opium, volunteered the statement that "they have [also] been able to synthesize morphine experimental[ly]"; in answers to further questions by the judge on this subject, the witness added that it was not commercially feasible to make the drug synthetically, and that the particular narcotic in this case

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

JANUARY 1960

---

was actually a derivative of opium (and therefore not synthesized). The judge then made the remark petitioner now challenges. But the fact is that the witness testified that this narcotic was of the imported variety; that no contrary testimony was offered or suggested; and that petitioner made no objection at the time to the judge's passing remark. In any event, under Section 4705(a), *supra*, p. 2, it is immaterial whether the narcotic is imported or not, and that section is the basis for counts one and three (App. 3-5).

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 536248 904